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No. 04-847

IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

v.

MICHAEL ANTHONY HANKS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Fourth Amendment, a probationer's prior consent to suspicionless searches and written waiver of Fourth Amendment rights permits search and seizure by officers unaware of the search condition.

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No.

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

v.

MICHAEL ANTHONY HANKS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner People of the State of California respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the Court of Appeal, Fifth Appellate District is submitted as Appendix A. The denial of the People's petition for review in the California Supreme Court is submitted as Appendix B.

JURISDICTION

The California Supreme Court denied review on September 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

1. On February 10, 1997, respondent Michael Anthony Hanks was placed on probation for his conviction of carrying a loaded firearm in public. His signed terms and conditions of probation included the condition that he "voluntary submit to a search of (his) person, vehicle or residence at the request of any peace officer or probation officer day or night without the necessity of a search warrant . . . without probable cause . . . for weapons." App. 61a. He remained on probation in August 1999. App. 25a.

2. On the evening of August 6, 1999, a heinous drive-by shooting occurred at Casa Loma Park in southeast Bakersfield, California, resulting in two deaths and several injuries. App. 3a- 4a. The Bakersfield police officers who responded to the scene described the people at the park as "hysterical" and the atmosphere at the park as "pandemonium" and "utter chaos." CA RT 40, 350, 375.

Casa Loma Park is in the neighborhood of a gang known as the Country Boy Crips, rival to the East Side Crips. App. 4a. A Country Boy Crips gang member in the park told the police that the East Side Crips were responsible for the shooting. CA RT 110-14.

Bakersfield Police Officers Carruesco and Heredia, both experts in criminal street gangs, were patrolling the East Side Crips neighborhood later that night, about six hours after the

shooting. CA RT 30-32. Knowing that retaliation is a normal part of gang life, Officer Carruesco believed that the Country Boy Crips would retaliate against the East Side Crips. CA RT 462-63. In his expert opinion, East Side Crips would have guns to protect themselves against retaliation. CA RT 463-65.

Respondent Michael Hanks was driving a Chevrolet Malibu in East Side Crips territory that night. CA RT 544-45. On probation for carrying a loaded firearm in public, he was subject to search for weapons by any peace officer. App. 61a. The other passengers in the car were Leon Anderson, Dontee Hester, and Torres Dawson. CA RT 543-46. Officer Carruesco recognized Leon Anderson in the right front passenger seat. CA RT 446-47. He knew Leon Anderson as a well-known member of the East Side Crips. CA RT 449-53, 461-62. He had contacted Leon Anderson at least five times in the past; each and every time Leon Anderson was with admitted members of the East Side Crips in the East Side Crips gang territory. App. 5a. Officer Carruesco observed that the other occupants of the Malibu were Black males. CA RT 446-47 . He knew that Crip gangs are predominantly comprised of Black males. CA RT 460.

Officer Carruesco saw the Malibu travel for over one-half mile with two other cars, a Mazda and a Chrysler, in the East Side Crips territory. App. 4a, 55a. Officer Heredia did not observe any cars other than these three in the area at that time. CA RT 33. The officers observed Black males in each of the three cars. CA RT 40-44, 535-36. While the officers followed the three cars, the cars never got more than one car length away from each other: the three cars began changing lanes, driving at the same speed, and crisscrossing each other in a very tight formation while still maintaining their group. App. 55a. The Chrysler was following so closely to the Malibu that Officer Carruesco could not pull in behind it after he had activated his emergency lights. CA RT 466. He drove next to these cars for about two blocks with his lights flashing; none of the cars would yield to him. CA RT 467. He saw that the Chrysler

contained two unidentified Black males in the front seats and two occupants of unknown race and gender in the back. App. 4a-5a.

Officers Carruesco and Heredia stopped the Malibu. App. 6a. Officer Carruesco suspected, based on his training and experience as well as his observations, that the vehicle contained armed East Side Crips gang members. CA RT 464-65. As the officers walked up to the Malibu to contact the occupants, Officer Heredia saw from outside the car that Dawson was handling a gun in plain view. App. 8a; CA RT 542-43. At the time the officers stopped the Malibu, they were unaware that respondent was on searchable probation. App. 25a.

3. An amended indictment was filed in Kern County Superior Court charging respondent and eleven co-defendants with conspiracy in violation of California Penal Code § 182 (a)(1). It was further alleged that respondent and the co-defendants conspired to commit a violation of California Penal Code § 12031(a)(2)(c), carrying a loaded firearm in public while being an active participant in a criminal street gang, and that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang in violation of California Penal Code § 186.22(b)(1). CA CT 527-28.

Prior to trial, respondent filed a motion to suppress evidence under the Fourth Amendment and pursuant to California Penal Code § 1538.5. The superior court denied the motion. The trial court found respondent guilty as charged. App. 2a.

4. The California Court of Appeal, Fifth Appellate District reversed the conviction, directing the trial court to grant the suppression motion. App. 2a. The California Supreme Court subsequently granted the People's petition for review. On January 14, 2004, the California Supreme Court transferred the case back to the Court of Appeal, Fifth Appellate District, with directions to vacate its decision and reconsider the cause in light of *Maryland v. Pringle,* 540 U.S. 366 (2003) and *People v. Sanders,* 31 Cal.4th 318, 73 P.3d 496 (2003). App. 3a.

5. On June 10, 2004, the Court of Appeal filed its second opinion in the case. The majority held that a probation waiver search must be reasonably related to the probation requirement, which requires that the officer conducting the search have knowledge of the waiver at the time of the search. The majority distinguished *Pringle* on the ground that the lawfulness of the car stop and any later search were not at issue. The majority again reversed the judgment of conviction and remanded the case to the trial court to vacate its order denying the motion to suppress and enter a new order granting the motion. App. 1a-58a.

6. On September 22, 2004, the California Supreme Court denied the People's petition for review.[1] App. 59a.

REASONS FOR GRANTING THE PETITION

California probationers who sign a "Fourth Amendment waiver" voluntarily consent to future warrantless search and seizure. Consent is a well-settled exception to both the warrant and probable cause requirements of the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "Consent searches," even those based on prior consent, are therefore constitutional. *Zap v. United States*, 328 U.S. 624, 628 (1946). However, the California courts have refused to apply the consent exception to probationers if the officer conducting the search is, subjectively, unaware of the probationer's Fourth Amendment waiver.[2]

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1. On October 22, 2004, at respondent's request, the Court of Appeal, Fifth Appellate District issued a modification of its earlier opinion that corrected a factual error in the final paragraph of the majority decision. That modification did not affect the court's ruling.

2. The California Supreme Court has rejected the State's petitions for review asserting consent as justification for probationer searches in this and three other published intermediate appellate cases. The People are left

In *United States v. Knights*, 534 U.S. 112, 118 (2001), the Court explicitly left open the question of whether a California probationer's Fourth Amendment waiver constituted consent within the meaning of *Schneckloth*. The Court evaluated the search under the totality of the circumstances, with the probationer's search condition being a salient circumstance. The California Supreme Court has rejected, without consideration, the consent exception for searches of probationers with signed "Fourth Waivers." *See* note 2. Contrary to *Knights*, the California courts also have refused to examine the totality of the circumstances with regard to probationer searches; rather, they have concluded that an officer's subjective knowledge of the probationer's "Fourth Waiver" is the sole factor to be considered in evaluating the constitutionality of a particular search or seizure. However, no single factor controls under *Knights*. Moreover, in logic, a probationer's waiver of his Fourth Amendment guarantees cannot turn on whether an individual officer is subjectively aware of the search condition. In exchange for a diminished sentence, a probationer agrees in advance to subject himself to search and seizure by *any* law enforcement officer.

The California courts' restraint on the consent exception is in direct conflict with *Anderson v. Virginia*, 256 Va. 580, 507 S.E.2d 339, 342 (1997). The Virginia Supreme Court recognizes that a probationer's agreement to a search by any law enforcement officer includes officers without knowledge of the search condition.

The impact of the California courts' misinterpretation of *Knights*, *Schneckloth*, and *Zap* is far-reaching. Probationers and parolees, historically, are prone to recidivate. See *United States*

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with no recourse other than to seek relief in this Court. *See People v. Hoeninghaus*, 120 Cal.App.4th 1180, 1186 (2004), review denied 10/13/04 in S127413; *People v. Lazalde*, 120 Cal.App.4th 858, review denied 10/13/04 in S127330; *People v. Bowers*, 117 Cal.App.4th 1261 (2004), review denied 8/11/04 in S125133.

v. Knights, 534 U.S. at 120. In 2003, California had over 370,000 adults on supervised probation. *Probation and Parole in the United States, 2003* NCJ 205336 (Washington D.C.: U.S. Department of Justice, 2003), at 3. These probationers' tendency to recidivate is the reason that the courts granting probation require that the individuals consent to warrantless search and seizure at any time by any law enforcement officer. A probationer's waiver of his Fourth Amendment rights is personal and immutable: it is not dependent upon an individual officer's subjective knowledge.

1. The question expressly left open in *Knights*–whether a California probationer's acceptance of a search condition constitutes consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights–must be resolved. The Fourth Amendment protects individuals only from unreasonable searches and seizures: a probationer who waived his Fourth Amendment rights and gave his advance consent to suspicionless search and seizure does not have a reasonable expectation of privacy as to any search or seizure conducted according to the terms of the probation condition.

It is well established that consent validates a search. *Schneckloth v. Bustamonte*, 412 U.S. at 219, 222. The only requirement for a consent search is that consent was voluntarily given. *Id.* at 248. Prior consent, voluntarily given, amounts to a waiver of an individual's Fourth Amendment rights. *Zap v. United States*, 328 U.S. 624, 628 (1946).

In *Zap*, a contractor wanting to do business with the Navy agreed, in advance, to inspections of his accounts and records. After the inspections disclosed irregularities, Zap claimed that the inspection of his accounts was an illegal search. This Court recognized that a person's rights under the Fourth Amendment may be waived: "when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 626-629.

The California Supreme Court has relied on *Zap* in its prior rulings in probationer consent searches; these holdings were a clear, consistent application of the consent exception for warrantless probationer searches. In *People v. Mason*, 5 Cal.3d 759, 765, 488 P.2d 630, (1971), the court found *Zap* "controlling . . . for it upheld the validity of an advance waiver of Fourth Amendment rights akin to the provisions of the probation condition." When a "defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had." *Id.* at 766. In *People v. Bravo*, 43 Cal.3d 600, 607, 738 P.2d 336 (1987), again upholding probationer searches, the court found that a probationer's consent to a search condition is "a complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner." A consent search--consent given in advance or contemporaneously--is not unreasonable under the Fourth Amendment "unless it exceeds the scope of the consent." *Id.* at 609. Additionally, a "waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons." *Id.* at 611. Other than these reasonable restrictions placed upon the search or seizure of a probationer, the California Supreme Court has not altered its view that "probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term." *People v. Woods*, 21 Cal.4th 668, 674, 981 P.2d 1019 (1999); *see People v. Reyes*, 19 Cal.4th 743, 749, 968 P.2d 445 (1998).

The California court's present restriction on probationer searches is not a reasonable application of the Fourth Amendment.[3/] The court of appeal did not find that

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3. The California Supreme Court has, by its refusal to accept review of this and similar cases, placed its imprimatur on the opinion of the court of appeal that a probationer's waiver of Fourth Amendment rights is

respondent's detention and the search of the vehicle for weapons exceeded the scope of the probation condition or that probationer's detention was undertaken for harassment of other arbitrary or capricious reasons. The sole determinative factor was that the officers were not personally aware of probationer's "Fourth waiver." App. 35a-40a.

This reasoning was rejected by the Virginia Supreme Court in *Anderson v. Virginia*, 256 Va. at 586. The defendant was a state probationer who had waived "his right to be free from unreasonable search and seizures for a period of one year." *Id.* at 583. Anderson contended on appeal "that the officers' lack of prior knowledge of [his] waiver rendered the search invalid." *Id.* at 586. The Virginia Supreme Court summarily rejected the claim: the waiver expressly stated that Anderson "agreed to submit his person or property to '*any* law enforcement officer.'" *Id.*, original italics.

The Virginia court is correct. "Any" law enforcement officer means any officer--even those unaware of the probation condition. When respondent was detained on August 7, 1999, by Officers Carruesco and Heredia, he had already consented, voluntarily and in writing, to be searched without reasonable cause by any peace officer, day or night. By his advance consent, he had waived his Fourth Amendment right to privacy and had subjected himself to warrantless, suspicionless search and seizures conducted within the scope of the probation condition. The fact that at the time of the detention these officers were unaware of respondent's waiver was inconsequential so long as the seizure was not conducted for the purpose of harassment or in an arbitrary or capricious manner. Because respondent consented to be searched by *any* peace officer, he consented to the detention and search on the morning of August 7.

In refusing to apply the consent exception to a detention

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not effective if the officer conducting the search or seizure is unaware of the probation condition.

where the officers were unaware of the probation condition, the California Supreme Court incorrectly limits probationers' "Fourth waivers." Respondent signed terms and conditions of probation that unequivocally required that he "voluntarily submit to a search of [his] person, vehicle or residence at the request of any peace officer or probation officer day or night without the necessity of a search warrant . . . without probable cause . . . for weapons." App. 61a. The trial court specifically required this condition before granting respondent probation so that the public would be protected to the greatest degree possible. Nevertheless, the California Supreme Court has rewritten this condition for respondent and all probationers subject to similar search clauses. Despite the unambiguous terms of the condition, probationers need now only submit to searches at the "request of any peace officer *who is subjectively aware of this probation condition.*" By this revision, the court has undermined the trial courts' ability to impose meaningful probation restrictions that both serve as a deterrent to recidivism and protect the public living in the same communities as released probationers. Moreover, the court has rejected *Zap* and its progeny and misapplied this Court's decisions validating consent searches.

2. The state court decision is wrong on its merits. Even assuming that respondent's probation search condition did not amount to a complete waiver of his Fourth Amendment rights, his detention was lawful under the totality of circumstances as expressed in *Knights*. A reviewing court must balance the degree to which a search intrudes upon an individual's privacy against the degree to which it is needed to promote legitimate governmental interests. *United States v. Knights*, 534 U.S. at 119. The court below refused to balance these factors in this case, focusing solely on the officers' lack of knowledge of respondent's prior consent in determining the constitutionality of his detention. This contravenes *Knights*.

A probation search condition is a "salient circumstance" under the *Knights* totality of the circumstances approach. *Id.*

at 118. As in *Knights*, respondent's probation order "clearly expressed the search condition" and respondent "was unambiguously informed of it." *Id* at 119. The probation condition thus "significantly diminished" respondent's reasonable expectation of privacy. *Id.* at 120. Moreover, the probation condition provided that respondent would "voluntarily submit to a search of [his] person, vehicle or residence at the request of any peace officer," App. 61a, without mentioning "purpose" or restricting the condition to search or seizures by only those officers aware of the search condition. *See id.*, at 116. On balance against respondent's significantly diminished expectation of privacy is the governmental "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise." *Id.* at 121.

Evaluating the totality of the circumstances, respondent's detention did not violate the Fourth Amendment proscription against unreasonable search and seizure. Respondent was on probation for a weapons offense, and he had signed a Fourth Waiver. In addition to providing advance consent to subsequent searches by any peace officer, the probation order also placed respondent, unambiguously, on notice that he would be subject to search at any time. On the morning of the detention, therefore, respondent knew that he was "searchable" as he was driving the Malibu on a public road. *See id.* at 119. When his car was stopped, he was required to "voluntarily submit" to a search of his person and vehicle. The fact that the officers were initially unaware that respondent was subject to a probationer search condition did not increase respondent's expectation of privacy where no reasonable expectation could exist[4/] On the day that respondent agreed to

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4. Furthermore, the fact that officers were initially unaware of the probation search condition at the time of the detention does not establish that the search was conducted for the purpose of harassment or in an arbitrary or capricious manner. *See People v. Bravo*, 43 Cal.3d at 611. Respondent had been driving in a suspicious manner along with three other cars. His front passenger was Leon Anderson, a well-known gang member from the East

the probation search condition, he could anticipate that this future seizure might occur. The judge who signed the probation order relied on respondent's exposure to suspicionless searches in granting respondent probation in a felony weapons offense.

Knights does not allow that any single factor controls the reasonableness of a probationer's search or seizure. It is not enough, for instance, that the probationer is subject to a search condition: the remaining circumstances attending a search must be evaluated. Likewise, the fact that an officer is subjectively unaware of a probationer's Fourth waiver also does not control under *Knights*. The California court erroneously reduced *Knights* to a single-circumstance test whereby an officer's knowledge of the search condition invalidated all other relevant circumstances. Respondent's detention was lawful under the Fourth Amendment under the totality of the circumstances made applicable to California probationers in *Knights*.

Side Crips. The officers were patrolling the neighborhood hours after a drive-by murder in which the East Side Crips were responsible. The officers suspected that the car contained other East Side Crips based on Anderson's presence. Founded on expertise in street gang activity, the officers suspected the car would contain firearms to protect the occupants from retaliation for the homicides earlier in the night. In response to this potential threat to the public safety, the officers in this case took the least intrusive police action available to them in their investigation. After looking in the car with a spotlight and recognizing Anderson, and observing the respondent's suspicious driving pattern, they stopped the car and merely walked up to it to contact the occupants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 15, 2004

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY HANKS, Defendant and Appellant.	F035120 (Super. Ct. No. SC078556) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice, Judge.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert P. Anderson, Assistant Attorney General, John G. McLean and Harry Joseph Colombo, Deputy Attorneys General; Edward R. Jagels, District Attorney, Thomas D. Sparks, Assistant District Attorney, Robert A. Barton and Garrett L.

Hamilton, Deputy District Attorneys, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

Michael Anthony Hanks was arrested after the vehicle he was driving was stopped by Bakersfield police officers who believed the vehicle might be involved in criminal activity related to the criminal street gang known as the East Side Crips. The officers found a firearm in the vehicle. After the trial court denied his motion to suppress, Hanks was found guilty of conspiracy to possess a firearm. (Pen. Code, §§ 182, subd. (a)(1), 12031, subd. (a)(2)(C).)[1]

In our original opinion, we reversed the judgment because we concluded the officers did not have probable cause to stop the vehicle and, therefore, the trial court erred in denying Hanks's motion to suppress.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

The Supreme Court granted review on March 13, 2002, S102961. On January 14, 2004, the case was transferred back to this court with instructions to vacate our decision and reconsider the matter in light of *Maryland v. Pringle* (2003) 124 S.Ct. 795 and *People v. Sanders* (2003) 31 Cal.4th 318.

We have received supplemental briefing from the parties and reviewed the authority cited in the transfer order. We conclude that *Maryland v. Pringle* and *People v. Sanders* support our original conclusion that the trial court erred in denying Hanks's motion to suppress. In all other respects, we reiterate our previous decision and, once again, reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

We draw the following factual summary from the undisputed testimony at the suppression hearing, where the only witnesses to testify about the stop were Bakersfield Police Officers Gary Carruesco and Martin Heredia.

Heredia and Carruesco were on patrol on the night of August 6 and the early morning of August 7, 1999, in an area of Bakersfield the officers considered East Side Crips territory. Heredia and Carruesco were aware that earlier

that evening a drive-by shooting had occurred at Casa Loma Park. Two people were killed in that shooting and at least two others wounded. Some of the victims were members of the Country Boy Crips criminal street gang, a rival of the East Side Crips. Heredia and Carruesco also were aware it was believed that either East Side Crips or West Side Crips, another criminal street gang, were responsible for the Casa Loma Park shooting.[2]

At approximately 12:30 a.m., Heredia and Carruesco observed three vehicles, a Chevrolet, Chrysler, and Mazda, driving side by side on a three-lane road. The officers followed the vehicles and used the spotlights on their patrol vehicle to determine what persons and how many were in the vehicles. They determined that four Black males between 15 and 25 years of age occupied the Chevrolet, and one of these individuals was Leon Anderson. They also determined four individuals occupied the Chrysler and two were Black males of the same age.

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2 West Side Crips also are rivals of the Country Boy Crips criminal street gang.

They could not identify the sex or race of the two rear passengers in the Chrysler. The officers did not observe the number, race or sex of the occupants in the Mazda. The officers could not identify any individual other than Anderson. Carruesco believed, nonetheless, that four Black males were in each vehicle.

Heredia had encountered Anderson on one other occasion. He did not know from this encounter, however, whether Anderson was affiliated with any gang. Carruesco had encountered Anderson on at least five other occasions in East Side Crips territory. Each time, Anderson had been in the presence of other members of the East Side Crips.

On one occasion, Carruesco had spoken with Anderson. At that time Anderson said he used to be a member of the East Side Crips but was no longer associated with the gang. Anderson admitted having many friends who were gang members. Carruesco observed several gang-related tattoos on Anderson.

Other individuals with whom Carruesco talked also had indicated that Anderson was one of the original members of a subset of the East Side Crips. Based on this information, Carruesco opined that Anderson was a current

member of the East Side Crips. He also suspected the other occupants of the vehicle were members of the East Side Crips.

Carruesco and Heredia followed the three vehicles for approximately one-half mile. They observed the vehicles change lanes from driving side by side to all following each other closely in a single lane. This maneuver preceded entrance into the left-turn lane. From the point that Carruesco and Heredia first looked into the interior of the vehicles with their spotlight until the vehicles were stopped was a distance of less than one-quarter mile. After making these observations and deductions, Carruesco and Heredia activated the emergency lights on their vehicle, an unmarked police car, and stopped the Chevrolet.

Carruesco explained his justification for the stop of the Chevrolet:

> "Based on the occupants of the vehicle being all black males and the recognition of Mr. Anderson as an East Side Crip, it has been my experience that gang members oftentimes hang out together in large groups because they have strength in numbers and [are] more intimidating in a larger group. [¶] ... [¶]

> "There had been a shooting at Casa Loma that turned into a homicide where the East Side Crips were suspected to be suspects. I believed that if they knew that they were suspected as being suspects, they would probably arm themselves. [¶] ... [¶]
>
> "There has been since I've been working here, an ongoing feud between those specific gangs, and it has been my experience that when there is a shooting against one gang, the victim gang retaliates against the suspect gang in a short period of time. [¶] ... [¶]
>
> "Based on the fact that there was a homicide in rival gang member territory and the fact that the East Side Crips were being named as the suspects, it is my opinion that the East Side Crips would arm themselves in fear of retaliation and for their own protection."[3]

The four occupants in the Chevrolet were Anderson, Hanks, Dontee Tyree Hester, and a juvenile Black male

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3 Carruesco admitted the stop was not made as a result of a Vehicle Code violation. Carruesco also testified that he wanted to stop the Chevrolet to determine if one of the occupants was Terry Turner, an East Side Crip, believed to be one of the individuals responsible for the shooting at Casa Loma Park. The People have abandoned this argument as a ground for justifying the stop of the Chevrolet.

(collectively defendants). Although not pertinent to our analysis, upon approaching the Chevrolet after the traffic stop, Heredia observed one of the passengers with a handgun. When the vehicle was searched, a loaded handgun was located under the front seat.

The defendants were charged in count one with conspiracy to carry a loaded firearm in a vehicle by members of a criminal street gang. (§§ 182, subd. (a)(1), 12031, subd. (a)(2)(C).) The information also alleged the conspiracy was committed for the benefit of a criminal street gang.

The defendants moved to suppress the gun and dismiss the indictment, arguing that Carruesco and Heredia did not have probable cause to stop the vehicle and there was no evidence of a conspiracy. The trial court denied both motions. Hanks waived his right to a jury trial and submitted the matter to the trial court based on the transcripts of the grand jury proceedings, motion to suppress, and motion to dismiss. The trial court found him guilty.

DISCUSSION

I. The Suppression Motion

Hanks contends Carruesco and Heredia did not have sufficient cause to justify the initial detention of the Chevrolet and, accordingly, any evidence obtained as a result of the stop should have been suppressed. The People argue there was reasonable suspicion to detain the vehicle. We begin by repeating the majority of our discussion on this issue from our vacated opinion.

The rules for review of denial of a motion to suppress are well established. This court reviews the explicit and implicit factual findings to determine if they are supported by substantial evidence. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.) We then exercise our independent judgment to determine if the facts found by the trial court establish a seizure in violation of the Fourth Amendment. (*Ibid.*)

Moreover, the rules applicable to search and seizure also are easily stated, if not easily applied. A seizure within the meaning of the Fourth Amendment occurs whenever an individual's liberty is restrained by the police, either by physical force or assertion of authority, to which

the individual submits, in circumstances in which a reasonable person would have believed he or she was not free to leave. (*People v. Soun, supra,* 34 Cal.App.4th at p. 1515.) Distinctions are drawn between "detentions" and "arrests," since, although both are seizures under the Fourth Amendment, the constitutional standard for permissible detentions "is of lesser degree than that applicable to an *arrest*." (*People v. Harris* (1975) 15 Cal.3d 384, 389.) A detention may be undertaken "if there is an articulable suspicion that a person has committed or is about to commit a crime" (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784), while probable cause for an arrest exists only "when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (*People v. Price* (1991) 1 Cal.4th 324, 410.)

Our concern is with the initial detention of the Chevrolet in which the defendants were traveling. Temporary detention of individuals during the stop of an automobile by the police constitutes a detention under the Fourth Amendment. (*Whren v. U.S.* (1996) 517 U.S. 806,

809-810.) The reasonableness of official suspicion is measured by what the officers knew before they acted. (*Florida v. J.L.* (2000) 529 U.S. 266, 271.)

We are required to determine whether Carruesco's reasoning resulted in a seizure that was in violation of the Fourth Amendment. "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) We focus on the totality of the circumstances in assessing whether the particularized and objective facts known to the police provided reasonable cause to detain appellant. (*Id.* at p. 238.)

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers.

> From these data, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained person.
>
> "The process does not deal with hard certainties, but with probabilities.... Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> "The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." (*United States v. Cortez* (1981) 449 U.S. 411, 418.)

Therefore, the issue presented in this case is whether Carruesco and Heredia had a particularized and objective basis to suspect someone in the Chevrolet had committed, or was about to commit, a crime, based on the information the officers knew at the time of the stop of the vehicle.

The People argue that although Carruesco and Heredia could identify only one individual in the Chevrolet, they had a particularized and objective basis to suspect the occupants of the Chevrolet had committed a crime by

carrying a loaded firearm in a vehicle. In their original brief, the People relied on the principles stated in *Cortez* to argue that the stop of the vehicle was reasonable. The People emphasized the "whole picture," as well as the "inferences and deductions" Carruesco made in deciding to stop the Chevrolet.

The whole picture consists of the Casa Loma Park shooting, the three cars driving together at 12:30 a.m. in East Side Crips territory, the identification of one occupant as an East Side Crip, and the presence of several Black males in the Chrysler and Chevrolet.

The inferences and deductions include (1) all three vehicles were traveling together; (2) everyone in the Chevrolet was an East Side Crip because they were Black males and were riding with Anderson; (3) everyone in the Chrysler was an East Side Crip because there were two Black males in the car and they were traveling with the Chevrolet; (4) everyone in the Mazda was an East Side Crip because the Mazda was traveling with the Chevrolet, even though Carruesco did not know the age, sex, or race of the occupants; (5) these gang members were aware of the Casa Loma Park shooting; (6) these gang members

were expecting retaliation; and (7) these gang members were armed because they were expecting retaliation.

In our original opinion, we concluded the stop violated the Fourth Amendment for two reasons. First, the inferences and deductions drawn by Carruesco were not supported by the facts. Second, the inferences and deductions made did not lead to a particularized and objective basis to suspect someone in the Chevrolet was engaged in criminal activity.

Carruesco's first conclusion, that all three cars were traveling together, is minimally supported by his observations. His observations, however, were for a very short distance. Carruesco did not provide any facts to support this conclusion other than that the cars were traveling side by side and later were in the same lane together. While Carruesco undoubtedly believed the three cars were traveling together, the observations were insufficient to permit such a conclusion.[4]

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[4] Carruesco did not testify that he saw the three vehicles maneuver in a tight formation. The People rely on Carruesco's testimony to justify the stop of the Chevrolet.

Next, Carruesco inferred that each individual in the Chevrolet was a gang member because the only individual in the car that he identified was known to him to be an East Side Crip, the cars were driving in East Sides Crips territory, and the Chevrolet contained Black males between 15 and 25 years of age. This conclusion, while one possible explanation for the few facts he observed, is unreasonable. There are far too many other possible explanations that fit these facts to conclude that everyone in the cars was a gang member. The only way to justify Carruesco's conclusion is to assume as fact that every Black male between the ages of 15 and 25 in this part of Bakersfield is an East Side Crip, or that every Black male between the ages of 15 and 25 who is in a car with an East Side Crip must be an East Side Crip. These conclusions are

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Heredia testified he observed some maneuvering by the vehicles, but this testimony appears to be referring to when the three vehicles changed from driving side by side to driving in a single file. The observation also was made from a distance, and Heredia could see only taillights moving in the lanes. There is no testimony that this maneuvering violated any traffic laws.

far too consistent with racial profiling to be constitutionally permissible. (*Whren v. U.S., supra,* 517 U.S. at p. 813; *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 885-886.) Carruesco testified, in fact, that only a small percentage of Black males in Bakersfield were members of the East Side Crips, directly undermining his conclusion.

Carruesco's third conclusion, that everyone in the Chrysler was an East Side Crip, is even more suspect. First, he observed only two of the occupants in the Chrysler. For all Carruesco knew, the other two occupants could have been elderly females. Second, the short time Carruesco followed the three cars did not justify his conclusion that the three cars were traveling together. Even if they were traveling together, the myriad of innocent explanations ignored by Carruesco precludes the conclusion that every occupant in the Chrysler was an East Side Crip.

Since we conclude that the inference that the occupants of the Chrysler were East Side Crips was unreasonable, Carruesco's conclusion that the occupants of the Mazda were East Side Crips also was unreasonable.

Carruesco did not know the sex, race, age or number of occupants in the Mazda.

Carruesco's assumption that every East Side Crip knew about the Casa Loma Park shooting also was unreasonable. Carruesco admitted he knew of no facts to show that the occupants, even if they were gang members, knew about the Casa Loma Park shooting. The shooting in the park occurred six hours before the stop. At least two suspects were arrested a short time after the shooting. While Carruesco may have believed that every East Side Crip knew of the shooting, a mere belief will not support a detention. (*People v. Conway* (1994) 25 Cal.App.4th 385, 389.)

Carruesco's final inference, that these gang members were expecting retaliation that night and, accordingly, were armed, is belied by Carruesco's testimony. First, Carruesco admitted that when he stopped the Chevrolet he did not know and could not determine whether any occupant would be armed or if a gun would be found.

Second, Carruesco testified that retaliation has been ongoing for a period of at least two years between rival

gangs.[5] He has seen retaliation for gang shootings that has occurred months after the first shooting. He admitted it was impossible to anticipate when retaliation would occur. Carruesco's reasoning, if accepted, would justify the stop of every vehicle in which four young Black males were riding for at least the last two years and into the foreseeable future. This reasoning would also permit detention of every Black male in the presence of a suspected current or former member of a criminal street gang. Carried to an extreme, this reasoning could be used to justify searches of the person, vehicle or home of every known or suspected, current or former, criminal street gang member in Bakersfield. They all may be armed because they all may be anticipating retaliation for some real or perceived slight. And that is all Carruesco knew when he stopped the Chevrolet -- the occupants *may* be armed because they *may* be expecting retaliation because they *may* be gang members

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[5] Officer William Darbee also testified that there have been very few times in the last five years when criminal street gangs have not been fighting in Bakersfield.

and they *may* have heard that there was a shooting in Casa Loma Park some six hours earlier.

The trial court, at one point during the hearing, recognized the fallacy of Carruesco's reasoning. "And this is the scary thing about this case, from my perspective.... I feel very uncomfortable with the idea or the concept that simply because you've got four male African-Americans in the vehicle at 12:30 a.m., that you can conclude from that that they're East Side Crips because they're in East Side Crip territory."

We disagree with our dissenting colleague. The Fourth Amendment does not permit detentions on such speculation. A detention is permissible only when there are specific *articulable facts* that, when considered in light of all the circumstances, provide some *objective* basis for concluding the person being detained may be involved in criminal activity. (*People v. Souza, supra,* 9 Cal.4th at p. 231.) Carruesco was unable to state any facts to indicate the occupants in this car were engaged in criminal activity. His assumptions, beliefs, opinions and guesswork are simply not the objective facts and permissible inferences required by the Fourth Amendment. (*People v. Conway,*

supra, 25 Cal.App.4th at p. 389.) The trial court erred when it failed to recognize this fundamental prerequisite to a constitutionally permissible detention.

We also find support for our conclusion in *Cortez*. In *Cortez* the border patrol was investigating a particular group that was smuggling illegal aliens across the border. The border patrol learned the following facts during a two-month investigation. The area they were investigating was a border crossing for illegal aliens. Over a period of time they located numerous tracks of individuals, all of which headed from the Mexican border and terminated near a specific point at Highway 86. Because they terminated at the highway, the officers concluded that a vehicle picked up the groups.

One set of footprints, which appeared repeatedly, left an impression with a distinctive pattern. The investigating officers designated this person "Chevron" and concluded he was the guide. Because the tracks often led to dead ends that required backtracking by the groups, and these areas would easily be avoided in daylight, the officers concluded the trips were made at night. By examining the tracks, the officers determined that the groups usually

contained between 8 and 20 individuals. Based on the times when they discovered Chevron's tracks, the officers determined that Chevron usually led groups across the border during or near weekends and on nights when the weather was clear.

The investigating officers were on duty on a Sunday night in late January. The absence of Chevron's tracks revealed that his last border crossing was in early January. The night in question was the first clear night after three days of rain. The officers concluded there was a strong possibility that Chevron would make a crossing that night.

The officers assumed that if Chevron made a crossing that night, he would leave Mexico after dark. They estimated the time it would take to make the crossing on foot and determined that Chevron would reach the pickup point between 2 a.m. and 6 a.m. that morning. The officers also determined that the pickup vehicle would approach the pickup point from the east and then return to the east, since that was the direction the groups were walking before they were picked up and it was unlikely that the groups would walk away from their ultimate destination.

On the night in question, the officers began their surveillance of Highway 86, approximately 27 miles east from the pickup point. The officers were looking for a vehicle large enough to carry groups of illegal aliens without drawing unwanted attention, such as pickups, vans, motorhomes and campers. They also were looking for a vehicle that headed westbound and then returned eastbound, within one and one-half hours, the time they estimated it would take to make the round trip from their vantage point to the pickup point. Only one distinctive camper met the criteria established by the officers. When the officers stopped the vehicle, they found six illegal aliens in the camper and an individual wearing shoes that matched the pattern of Chevron's shoes.

The United States Supreme Court held the detention did not violate the Fourth Amendment. The court began by reiterating that the Fourth Amendment applied to brief, investigatory stops, such as the one at issue here. (*United States v. Cortez, supra,* 449 U.S. at p. 417.) "Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion'

are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances the whole picture -- must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [Citations.]" (*Id.* at pp. 417-418.)

The United States Supreme Court concluded the officers used objective facts to draw permissible inferences to form a legitimate basis for suspicion of a particular person and for action on that suspicion. (*United States v. Cortez, supra,* 449 U.S. at p. 419.) The court held that, based on the whole picture of the two-month investigation, these experienced border patrol agents reasonably could surmise that the particular vehicle they stopped was engaged in criminal activity. (*Id.* at pp. 421-422.)

Our original opinion concluded that the "whole picture" did not form a legitimate basis for suspicion that anyone in the Chevrolet was committing an illegal act. Carruesco and Heredia's investigation lasted closer to two minutes than two months. They were on a heightened state

of alert because of the desire to prevent escalation of ongoing gang conflicts. In contrast to the extensive investigation and rational deductions found in *Cortez*, Carruesco and Heredia acted on a hunch and intuition, neither of which will support a detention. (*People v. Conway, supra,* 25 Cal.App.4th at p. 389.)

Reducing this stop to its essence, Carruesco and Heredia acted because a passenger in the vehicle was a member of the East Side Crips. Mere membership in a criminal street gang, without additional *facts* supporting an inference of criminal activity, does not permit a detention. (*People v. Rodriquez* (1993) 21 Cal.App.4th 232, 239.) Carruesco and Heredia violated the Fourth Amendment rights of the occupants of the Chevrolet by stopping the vehicle without a particularized and objective basis for suspecting the persons stopped of criminal activity.

III. Probation Search Conditions

The People also contended originally that even if Carruesco and Heredia illegally detained the vehicle, the motion to suppress properly was denied because three of the occupants in the Chevrolet were subject to probation or

parole search conditions. Again, we repeat the majority of our original discussion of the issue.

Although the record is far from clear, it appears that Hanks, Hester and the juvenile male were on probation.[6] Carruesco and Heredia were unaware the occupants were on probation at the time they stopped the Chevrolet. Hanks argues that because Carruesco and Heredia did not know anyone in the Chevrolet was on probation, the detention cannot be justified by a probation search condition.

Resolution of this issue requires a review of California Supreme Court cases dealing with parole and probation searches. In *People v. Burgener* (1986) 41 Cal.3d 505, the defendant was suspected of committing a robbery, during which a convenience store clerk was killed. The defendant was on parole with a warrantless search condition. After the defendant was arrested, the police

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6 We granted the People's request that we take judicial notice of court orders involving Hanks's probation to clarify the issue. These records indicate that Hanks was on adult probation and subject to a warrantless search for weapons.

searched the apartment he lived in, with the consent of defendant's parole officer. Incriminating evidence was found in the apartment.

The defendant argued the incriminating evidence should have been suppressed because the search was conducted without a warrant. The Supreme Court first affirmed that parolees have a reduced expectation of privacy and, accordingly, certain governmental intrusions into their privacy are permissible. (*People v. Burgener, supra,* 41 Cal.3d at p. 531.) The Supreme Court, after noting the myriad of regulations a parolee is subjected to upon release from prison, held "The interest in parole supervision to ensure public safety, which justifies administrative parole revocation proceedings in lieu of criminal trial with the attendant protections accorded defendants by the Bill of Rights, also permits restrictions on parolees' liberty and privacy interests. Balancing these interests of the parolee against the societal interest in public safety leads us to conclude that warrantless searches of parolees are not per se unreasonable if conducted for a purpose properly related to parole supervision." (*Id.* at p. 532.) The court continued that society's interest in public

safety permits parole searches on a reasonable suspicion standard, a standard that would not rise to the level of probable cause in the typical criminal context. (*Id.* at p. 534.) This standard must be based on articulable facts and rational inferences that would lead an objectively reasonable person to conclude there was reasonable suspicion that the parolee was involved in criminal activity. (*Ibid.*) The Supreme Court concluded that the search met the required standard and the fact that the search was conducted for the purpose of discovering evidence to support new criminal charges was of no moment. (*Id.* at p. 536.) "The societal interest in parole supervision and in the speedy return of parole violators to prison in order to protect the public has added weight, not less, when a reasonable suspicion exists to believe that a parolee has been involved in criminal activity. Any violation of the law is also a violation of the conditions of a parole. The law enforcement purpose of the police who seek authorization from the parole agent for a warrantless search, and the parole supervision purpose of the agent who gives that authorization are indistinguishable." (*Ibid.*)

In *People v. Bravo* (1987) 43 Cal.3d 600, the defendant was a probationer with a warrantless search condition as a condition of his probation. Police officers received a tip that defendant was selling drugs. Although surveillance of his residence did not reveal any suspicious activity, a search of his residence pursuant to the probation terms located illegal drugs.

Defendant argued that a search pursuant to the probation requirement could occur only if the officers had reasonable cause to suspect defendant was involved in criminal activity. The Supreme Court disagreed, holding that by accepting probation with a warrantless search condition the defendant voluntarily waived his right to privacy, save only his right to object to harassment or to object to searches conducted in an unreasonable manner. (*People v. Bravo, supra,* 43 Cal.3d at p. 607.) The Supreme Court distinguished *Burgener* by distinguishing between probation, in which a probationer voluntarily waives a right to be free from unreasonable searches in exchange for escaping a prison sentence, and parole, in which the warrantless search requirement is not voluntary. (*Id.* at p. 608.) A parolee does not waive his right to be free

from unreasonable searches, but the condition is imposed on him by statute on his release from prison. A probationer, however, voluntarily waives his right since probation is a privilege, and the probationer has an option to refuse the condition if he or she finds it too burdensome. (*Ibid.*)

The Supreme Court added that the probationer's waiver of his Fourth Amendment rights did not allow searches undertaken for harassment or searches for arbitrary or capricious reasons. (*People v. Bravo, supra,* 43 Cal.3d at p. 610.) "We do not suggest that searches of probationers may be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes.... We hold only that a search condition of probation that permits a search without a warrant also permits a search without 'reasonable cause,' as the former includes the latter. [Citation.]" (*Id.* at pp. 610-611.)

In *In re Tyrell J.* (1994) 8 Cal.4th 68, a juvenile was on probation and was subject to a search condition at any time by any law enforcement officer. An officer stopped the juvenile and some friends because of suspicious

behavior. The officer did not know the juvenile was on probation. During the course of the stop, the officer searched the juvenile and found illegal drugs. The trial and appellate courts both concluded that, absent the probation term, the search violated the Fourth Amendment.

The Supreme Court, after distinguishing between adult and juvenile probationers, concluded the juvenile did not have a reasonable expectation of privacy that society was willing to recognize as legitimate. (*In re Tyrell J., supra,* 8 Cal.4th at p. 86.) "Tyrell J. was subject to a valid search condition, directly imposed on him by the juvenile court in a prior matter. We presume he was aware of that limitation on his freedom, and that any police officer, probation officer, or school official could at any time stop him on the street, at school, or even enter his home, and ask that he submit to a warrantless search. There is no indication the minor was led to believe that only police officers who were aware of the condition would validly execute it. The minor certainly could not reasonably have believed [the officer] would not search him, for he did not know whether [the officer] was aware of the search condition. Thus, any expectation the minor may have had

concerning the privacy of his bag of marijuana was manifestly unreasonable." (*Ibid.*)

Parole searches were next addressed in *People v. Reyes* (1998) 19 Cal.4th 743, where the court addressed the "tension" between *Tyrell J.* and *Burgener*. In *Reyes* defendant was on parole and agreed to a parole condition that permitted any law enforcement officer to search him and his residence without a warrant. Defendant's parole officer received a tip that defendant may be under the influence of illegal narcotics. The parole agent requested the local police to evaluate defendant to determine whether the tip was accurate. The officers observed defendant exiting a small shed in back of his house but did not identify any suspicious activity. The officers searched the shed and located methamphetamine.

The Supreme Court held that when an involuntary search condition is properly imposed, the searching officers are not required to have a reasonable suspicion of criminal activity before conducting the search. "Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes, supra,* 19 Cal.4th at p. 752.) Accordingly, the

search of defendant did not violate his Fourth Amendment rights.

In *People v. Woods* (1999) 21 Cal.4th 668, an officer observed Mofield carrying a long object covered by a cloth, walking in front of a house occupied by Loza. The officer knew that Loza was on probation and that she had agreed to warrantless searches of her residence. When Mofield saw the officer, he quickened his pace and turned into a driveway. The officer detained Mofield and discovered a long knife under the cloth and drugs and drug paraphernalia on his person.

After he was arrested, Mofield told the officer he resided with Loza. Believing he would find incriminating evidence against Mofield, the officer decided to conduct a probation search of Loza's residence. When he knocked on the door, Loza refused permission to enter. The officer reminded Loza of her probation search condition and entered the premises. He discovered defendants, who also lived in the residence, in a bedroom, along with additional drugs and paraphernalia.

The trial court ordered the evidence against defendants suppressed because it found that the officer used

the probation search condition as a pretext to look for incriminating evidence against Mofield. The Supreme Court accepted this factual finding but reversed the trial court's order of suppression, concluding that the subjective intent of the officer conducting the search is irrelevant. (*People v. Woods, supra,* 21 Cal.4th at pp. 680-681.) The Supreme Court held that the probation search was justified because the officer had been told three days before that drugs were being sold out of the house and because of Mofield's actions as observed by the officer that day. (*Id.* at p. 681.) The Supreme Court limited its holding by stating that the search may not exceed the probation search clause at issue, may not be undertaken in a harassing or unreasonable manner, and is limited to those portions of the residence over which the officers reasonably believe the probationer has complete or joint control. (*Id.* at p. 682.)

In *People v. Robles* (2000) 23 Cal.4th 789, the Supreme Court was faced with the question of a warrantless search conducted at the home of a probationer. The officers suspected defendant, who lived with the probationer, of being involved in the theft of a car. The officers believed the stolen vehicle was located in the

garage of the residence shared by the probationer and defendant, who were brothers. At the time the officers conducted the search, however, they were not aware the probationer lived at the house and that his probation contained a search condition. The People tried to justify the otherwise illegal search by arguing the police had a right to conduct the search since the probationer lived at the house.

The Supreme Court rejected the argument and found the search violated the defendant's Fourth Amendment rights. "It is true that if persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition. [Citations.] Critically, however, cohabitants need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances. Thus, while cohabitants have no cause to complain of searches that are reasonably and objectively related to the purposes of probation -- for example, when routine monitoring occurs [citation] or when facts known to the police indicate a possible

probation violation that would justify action pursuant to a known search clause [citation] -- they may legitimately challenge those searches that are not." (*People v. Robles, supra,* 23 Cal.4th at pp. 798-799.)

Significant for our purposes, the Supreme Court rejected the People's argument that any search conducted of a probationer's home is authorized, regardless of whether the police had knowledge that the probationer resided at the home. "Contrary to the People's argument, *People v. Woods, supra,* 21 Cal.4th 668 does not support the proposition that police officers may lawfully enter a residential premises, without a warrant and without any awareness of a resident's probation search condition, to indiscriminately search for and seize evidence of suspected criminal wrongdoing. As our decisions indicate, searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation. [Citations.] Significantly, a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence. Moreover, if officers lack knowledge of a

probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*People v. Robles, supra,* 23 Cal.4th at p. 797.)

The United States Supreme Court's decisions on this issue are not helpful. The only decision we found that remotely approaches this issue is *Whren v. U.S., supra,* 517 U.S. 806, which held that a Wisconsin statute that provided that parole searches could be conducted without a warrant any time a parole agent had a reasonable suspicion the parolee was involved in criminal activity did not violate the Fourth Amendment. *Whren* did not hold that the Fourth Amendment imposes a reasonable suspicion requirement.

The Supreme Court approached the issue in *United States v. Knights* (2001) 534 U.S. 112. Knights was subject to a probation search condition. An officer investigating a string of arson fires was aware of the probation search condition and formed a reasonable suspicion that Knights was responsible for the fires. Knights contended the search violated the Fourth Amendment because the search was

conducted for investigative purposes instead of probationary purposes.

The Supreme Court reiterated that "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.' [Citation.] Knights' status as a probationer subject to a search condition informs both sides of that balance." (*United States v. Knights, supra,* 534 U.S. at pp. 118-119.) The Supreme Court held "that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." (*Id.* at p. 122.) The Supreme Court did not decide whether the probation search condition "so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent, see *supra*, at 118) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.

The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." (*Id.* at p. 120, fn. 6.)

We concluded in our original opinion that the California Supreme Court cases do not require a police officer to have a reasonable suspicion of criminal activity to conduct a warrantless search pursuant to a probation waiver. The United States Supreme Court has not held otherwise. The search, however, reasonably must be related to the probation requirement. This will require in most, if not all, situations that the officer know at the time the search is conducted that the person or residence being searched is subject to a warrantless search. With one exception, the Supreme Court has not held that a probation waiver may justify a search where the officer did not know that the person or residence was subject to such a waiver.

That one exception, *Tyrell J.*, is distinguishable for three reasons. First, as pointed out by the Supreme Court, a juvenile probationer does not voluntarily waive his rights as an adult probationer does, but instead is subject to an imposed condition similar to an adult parole. (*In re Tyrell*

J., supra, 8 Cal.4th at pp. 81-83.) Second, Hanks was not on juvenile probation at the time he was arrested. Third, as we concluded in our original opinion, this case presents a different issue than *Tyrell J.* We are not concerned with whether a probation waiver can justify a search; the issue in this case is whether the stop of a lawfully operated vehicle can be justified because a passenger in the vehicle was on probation when the officers stopping the vehicle had no knowledge of the probation/parole status of any occupant in the vehicle.

We answered no to that question in our original opinion. We can envision no conduct more unreasonable than stopping a vehicle and then hoping the stop later can be justified if one of the occupants in the vehicle happens to be on probation or parole. Such a stop cannot reasonably be related to a probation/parole search condition because the officer(s) did not know the individual was on probation or parole. We have not located, and the parties have not cited, any Supreme Court case that has approved such conduct. We concluded in our original opinion that whether such conduct is described as unreasonable

harassment, or arbitrary and capricious, it is prohibited by the Fourth Amendment.

IV. Review and Remand

The order transferring this case back to us required us to vacate our original decision and reconsider the issue in light of *People v. Sanders, supra,* 31 Cal.4th 318 and *Maryland v. Pringle, supra,* 124 S.Ct. 795.

In *Sanders* the defendants, Sanders and McDaniel, shared an apartment. Neighbors called the police when they heard the two arguing. When Sanders opened the door, there were signs that a physical altercation had occurred. The police entered the apartment, handcuffed both defendants, and performed a protective sweep of the premises. During the protective sweep, the officers observed evidence of drug sales. The officers learned that McDaniel was on parole with a search condition. The officers then searched the premises and found illegal drugs. The defendants pled guilty after the trial court denied their motions to suppress.

The Supreme Court held that the protective sweep was not justified as a parole search. (*People v. Sanders, supra,* 31 Cal.4th at p. 322.) After analyzing both United

States Supreme Court precedent and its own precedent, the Supreme Court concluded "Sanders had a reduced expectation of privacy because she was living with a parolee subject to a search condition, but she 'need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances.' (*People v. Robles, supra,* 23 Cal.4th 789, 799.) That McDaniel was on parole while the defendant's brother in *Robles* was on probation makes no difference; the expectation of privacy of cohabitants is the same whether the search condition is a condition of probation or parole. It is clear that the search was unlawful as to Sanders." (*Sanders,* at p. 330.)

The Supreme Court reached the same conclusion regarding McDaniel. (*People v. Sanders, supra,* 31 Cal.4th at p. 332.) The Supreme Court cited two reasons for this result. First, the reasonableness of a search is determined by the circumstances *known* to the police officer at the time he conducts the search. A parole search condition of which the police officer did not know, therefore, cannot be included in the circumstances that are considered when

determining the reasonableness of a search. (*Id.* at pp. 332-334.)

The second reason for the Supreme Court's holding was that to hold otherwise would be to encourage police misconduct. This conclusion was based on the sanction imposed for violation of the Fourth Amendment's prohibition against unreasonable searches and seizures -- the exclusionary rule. "The rule serves '"to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it."' [Citation.] 'The rule also serves another vital function -- "the imperative of judicial integrity." [Citation.] Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus, in our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which

produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.' [Citations.] [¶] Thus, the admission of evidence obtained during a search of a residence that the officer had no reason to believe was lawful merely because it later was discovered that the suspect was subject to a search condition would legitimize unlawful police conduct. Accordingly, we hold that an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*People v. Sanders, supra,* 31 Cal.4th at pp. 334-335.)

The issue in *Pringle* was whether a police officer had probable cause to arrest the defendant, one of three persons occupying a vehicle lawfully stopped for speeding. When the officer asked for the vehicle registration, Pringle opened the glove compartment of the car. The officer observed over $700 wrapped in a roll in the glove compartment. After verifying Pringle was not wanted, the police officer warned Pringle about his speed and requested permission to search the vehicle. Pringle consented.

Cocaine was found in the back seat. The officers arrested all three occupants when none would admit ownership of the cocaine.

Pringle contended the officer did not have probable cause to arrest him. The Supreme Court disagreed. (*Maryland v. Pringle, supra,* 124 S.Ct. at pp. 798, 802.) After citing well-established authority on probable cause to arrest,[7] the Supreme Court distinguished two cases, *Ybarra*

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[7] "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.' [Citation.] On many occasions, we have reiterated that the probable-cause standard is a ' "practical, nontechnical conception" ' that deals with ' "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ' [Citations.] '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.' [Citation.]

"The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. [Citations.] We have stated, however, that '[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' [citation], and that the belief of guilt must be particularized

v. Illinois (1979) 444 U.S. 85 and *United States v. Di Re* (1948) 332 U.S. 581.

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with respect to the person to be searched or seized, [citation]. In *Illinois v. Gates* [(1983) 462 U.S. 213, 235], we noted:

> 'As early as *Locke v. United* States, 7 Cranch 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context: "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation .... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the quanta ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. [Citation.] Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.' [Citation.]

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause, [citation]." (*Maryland v. Pringle, supra,* 124 S.Ct. at pp. 799-800.)

In *Ybarra* a warrant was obtained to search a tavern and its bartender for controlled substances. In executing the warrant, the officers also searched Ybarra, one of the tavern's customers, and found heroin. The Supreme Court held the search violated the Fourth Amendment. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. [Citation.] Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." (*Ybarra v. Illinois, supra,* 444 U.S. at p. 91.)

The *Pringle* court distinguished *Ybarra.* "This case is quite different from *Ybarra.* Pringle and his two companions were in a relatively small automobile, not a public tavern. In *Wyoming v. Houghton* [(1999)] 526 U.S. 295, we noted that 'a car passenger -- unlike the unwitting tavern patron in *Ybarra* -- will often be engaged in a

common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.' *Id.*, at 304-305. Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." (*Maryland v. Pringle, supra,* 124 S.Ct. at p. 801.)

In *Di Re* an informant told an officer that he would be receiving counterfeit gasoline ration coupons from Buttitta at a designated place. The officer arrived at the designated place to find his informant sitting in a car holding gasoline ration coupons. Also in the car were Buttitta and Di Re. The informant stated that he had received the counterfeit coupons from Buttitta. All three were arrested. The Supreme Court held there was not probable cause to arrest Di Re because there was no information implicating Di Re and no information pointing to Di Re's possession of the counterfeit coupons. (*United States v. Di Re, supra,* 332 U.S. at pp. 592-594.) "Any

inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." (*Id.* at p. 594.)

The *Pringle* court distinguished *Di Re* because no one in this case provided information about the ownership of the money or the cocaine before they were arrested. (*Maryland v. Pringle, supra,* 124 S.Ct. at p. 801.)

The People contend that *Sanders* and *Pringle* compel us to abandon our original analysis and conclude that "based on his training and experience, Officer Carruesco had reasonable suspicion to believe that Leon Anderson was traveling with gang members and firearms." According to the People, if we analyze the facts in a nontechnical fashion, there was a reasonable suspicion that a crime was being committed. The People base this argument on the above cited facts and the assertion that because each time Carruesco previously encountered Anderson, he always was accompanied by East Side Crips gang members. The People contend that it was therefore reasonable for Carruesco to assume that Anderson was with East Side Crips on this occasion.

The People also argue, even if we find the stop of the car violated the Constitution, *Sanders* left intact the analysis of *Tyrell J.*, and the stop was thus justified by Hanks's probation search condition.

We find nothing in either *Sanders* or *Pringle* that convinces us our original conclusions were incorrect. In fact, we find support in both cases.

In *Pringle* the police made a lawful traffic stop and conducted a consensual search of the vehicle. Here, the stop was based on Carruesco's beliefs and, as established above, violated the Fourth Amendment. The general statements about probable cause in *Pringle* add nothing to our analysis.

Nor do the facts of *Pringle* and the cases discussed therein aid our analysis. In *Pringle*, the issue was whether the officer had probable cause to arrest Pringle when the illegal drugs found in the car could have belonged to any of the three occupants. Again, the drugs were found pursuant to a lawful stop and consent to search the vehicle.

In this case the issue was whether Carruesco and Heredia had a particularized and objective basis for suspecting the occupants of a lawfully operated vehicle of

committing a crime, not whether there was probable cause to arrest the occupants. It is undisputed that once the officers observed the gun, they had probable cause to arrest the occupants. The unconstitutional stop of the vehicle, however, requires the observation of the gun and any subsequent information obtained as a result of the stop be suppressed.

Ybarra and *Di Re* are similarly inapposite. *Ybarra* addressed the right to search all patrons of a tavern when the search warrant was limited to the tavern and the bartender. *Di Re* addressed the arrest of all passengers in a vehicle when the arresting officer had particularized information that only one of the individuals in the car committed a crime.

Carruesco had no *facts* that anyone in the car had committed a crime. Again, the issue is the stop of the vehicle, not the subsequent arrest.

Nor does *Sanders* provide any support for the People's argument. The People urge us to limit the holding of *Sanders* to its specific facts, a warrantless search of the residence of a parolee, combined with a lack of knowledge of the residents' parole search conditions.

To be sure, the opinion in *Sanders*, as well as the opinion in *Robles*, notes that the search of a home requires more stringent or different Fourth Amendment analysis. (*People v. Sanders, supra,* 31 Cal.4th at p. 324; *People v. Robles, supra,* 23 Cal.4th at pp. 798-800.) In fact, *Sanders* limited its holding to the unlawful search of an adult parolee. (*Sanders,* at p. 335.)

Sanders, however, implies that otherwise illegal detentions or searches will seldom be transformed into constitutionally permissible police action by the after-acquired knowledge that the subject was on parole or probation with a search condition. The Supreme Court focused on the purpose for the exclusionary rule and the requirement that the search is evaluated based on what was known to the officer *at the time he or she acted.* The majority opinion also recognized that *Tyrell J.* departed from this traditional analysis and instead focused on the juvenile's expectation of privacy, a departure that has received substantial criticism. (*People v. Sanders, supra,* 31 Cal.4th at pp. 328-329.) Under the *Sanders* analysis, a parole or probation search condition unknown to the officer

at the time he acted would not appear ever to justify a search or seizure.

The Supreme Court, however, has not yet reached this result. *Sanders* did not overrule *Tyrell J.* (*People v. Sanders, supra,* 31 Cal.4th at p. 335, fn. 5.) Therefore, *Tyrell J.* remains the law in California. The question, then, is whether *Tyrell J.* applies to adult parolee/probationers.

We are not the first court to address the effect of *Sanders*. *People v. Bowers* (2004) 117 Cal.App.4th 1261 involved a defendant standing in front of a house when he was searched by an officer. The defendant was on adult probation, although the officer was unaware of the probation or search condition. The trial and appellate courts both originally held the case was controlled by *Tyrell J.* and denied the defendant's motion to suppress. The Supreme Court granted review and remanded the matter back to the appellate court after rendering its decision in *Sanders*.

The appellate court concluded that after the *Sanders* decision, the only basis for distinguishing *Sanders* from *Tyrell J.* was "'the special needs' of the system applied to juvenile offenders." (*People v. Bowers, supra,* 117

Cal.App.4th at p. 1268.) "In every other respect, the Supreme Court's discussion of *Tyrell J.* throughout *Sanders* was clearly disapproving." (*Id.* at p. 1269.) The appellate court held that because the defendant was not on juvenile probation, *Sanders* compelled the conclusion that the search violated the defendant's Fourth Amendment rights because the officers did not know that the defendant was on probation at the time of the search. (*Ibid.*)

We agree with *Bowers* that *Tyrell J.*, if it retains any viability at all, must be limited to juveniles who are subject to a juvenile probation condition.

In this case, Carruesco and Heredia did not know Hanks, or anyone else in the vehicle, was on probation. Moreover, *they did not know who was in the vehicle with Anderson*. The purpose of the exclusionary rule, to discourage violations of the Fourth Amendment, would be violated if we permitted such conduct. To admit evidence obtained from an unlawful detention because, fortuitously, one of the occupants was on parole or probation would encourage police officers to commit misconduct. Vehicles could be stopped without justification in the hope that an occupant would be on parole, an especially attractive risk in

a high-crime area when the vehicle contains four young Black males, like the circumstances in this case. We would be derelict in our obligation to uphold the Constitution of this state and the United States if we permitted such conduct.

DISPOSITION

The judgment is reversed and the cause remanded to the superior court. The superior court is directed to vacate its order denying the motion to suppress and enter a new order granting the motion. The court is directed to vacate the guilty plea if Hanks makes an appropriate motion within 30 days after the remittitur is issued. In that event, the superior court should reinstate the original charges and allegations contained in the information if the prosecution so moves. If Hanks does not move to vacate the guilty plea, the trial court is directed to reinstate the original judgment.

CORNELL, J.

I CONCUR:

LEVY, J.

BUCKLEY, Acting P.J.

I respectfully dissent.

I must acknowledge that in the first opinion in this case prior to remand, I had concurred in the majority. However, upon a re-review of the facts and the applicable law, I am convinced I was wrong, as is the present majority.

Drawing from the facts as set forth by the majority and cognizant of certain additional and significant facts not set forth, I conclude there was a reasonable suspicion to detain the vehicle.

Officer Carruesco testified that he had contacted Leon Anderson at least five occasions previously. On each occasion, he was in the company of admitted East Side Crips gang members. Moreover, he testified the driving pattern occurred for a distance of over one-half mile. Officer Heredia testified that he saw the three vehicles in a very tight formation criss-cross each other in the different lanes while maintaining their group.

It would appear obvious that the drivers (and occupants) of the vehicles knew each other and were driving in tandem. Given Officer Carruesco's expertise as

a street gang expert, his familiarity with the East Side Crips and given his knowledge of Anderson's proclivity to associate primarily, if not exclusively with fellow gang members, it was certainly reasonable to assume the vehicles were carrying East Side Crips gang members.

With this reasonable assumption and the awareness that the East Side Crips would be armed for protection from retaliation by Country Boy Crips, the officers would have been remiss in failing to detain the vehicles to determine if the occupants were armed or at least the reason why they were driving in the manner in which they were. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur ...." (*Adams v. Williams* (1972) 407 U.S. 143, 145 [a case involving detention of a person seated in an automobile based on information the detainee had a gun].) The Supreme Court further opined that a brief stop of a suspicious person, in order to determine his identity or to maintain the status quo momentarily may be most reasonable to in light of the facts known to the officer at that time. (*Id.* at p. 146.)

The majority sets forth a list of seven 'inferences and deductions," presumably of the police officers, and then dissects the conclusions.

The majority acknowledges the first conclusion (that the vehicles were together) is "minimally supported" but then states that it was for such a short distance that the observations were really insufficient. I disagree. The manner in which the vehicles were proceeding, for a distance of over one-half mile leads to only one reasonable conclusion: They were together.

Next, the majority, singling out the identity of Leon Anderson, finds insufficient the conclusion that the other occupants in Anderson's vehicle were East Side Crips. The majority decision gives no credence to the testimony of Carruesco that on every occasion (over five) in which contact had been made with Anderson, admitted East Side Crips were with him. Carruesco's testimony and expertise were unchallenged in the trial court. Accordingly, we are bound to accept it.

Likewise, it would be reasonable to conclude the occupants in the other two vehicles were fellow gang members.

While I would agree with the majority that there was no direct evidence to show that the vehicles' occupants had learned of the shooting six hours previously and therefore would neither expect retaliation nor be armed accordingly, it would be highly unlikely that a gang shooting in an adjacent neighborhood would not be common knowledge on the streets within hours, if not minutes, of the shooting.

In conclusion, given the circumstances, if the officers had not detained the vehicle and further gang violence were to have occurred, the officers would have been justifiably criticized by their superiors and/or the public. I would uphold the detention and affirm the conviction.

BUCKLEY, Acting P.J.

APPENDIX B

COURT OF APPEAL, FIFTH APPELLATE DISTRICT - NO. F035120
S126473

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MICHAEL ANTHONY HANKS, Defendant and Appellant.

Petition for review DENIED.

Baxter, J., is of the opinion the petition should be granted.
George, C.J., was absent and did not participate.

BROWN

Acting Chief Justice

APPENDIX C

IN THE BAKERSFIELD MUNICIPAL COURT DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff
vs.
MICHAEL HANKS
Defendant(s)

No. 539044

DEFENDANTS ACKNOWLEDGEMENT OF ADVISAL, UNDERSTANDING AND WAIVER OF CONSTITUTIONAL RIGHTS

I, the undersigned defendant in the above entitled action, understand and have been advised by the Court or my attorney, of certain constitutional rights, to wit:

1. MY RIGHT TO HAVE AN ATTORNEY. I understand that I have the right to retain and consult an attorney. If I cannot afford to hire an attorney, I understand that the Court must appoint an attorney. I understand that I have the right to have an attorney present during all proceedings. ☑ Inapplicable: represented by counsel.

I UNDERSTAND AND GIVE UP THIS RIGHT _____

2. MY RIGHT TO TRIAL BY JURY. I understand that I have the right to have my guilt or innocence decided by twelve (12) persons of the community sitting as a jury and if I give up my right to trial by jury. I have the right to be tried by a judge sitting without a jury. I have the right to present a defense.

I UNDERSTAND AND GIVE UP THIS RIGHT MH

3. MY RIGHT TO A SPEEDY TRIAL. I understand that I have a right to enter a plea of nolo contendere or guilty or to be brought to trial within thirty (30) days from the date of my arraignment if I am in custody, or forty-five (45) days from the date of my arraignment if I am not in custody and that if I am not brought to trial or enter a plea within the statutory period of time. I have a right to have my case dismissed unless I personally waive the statutory time limit.

I UNDERSTAND AND GIVE UP THIS RIGHT MC

4. MY RIGHT TO CONFRONTATION OF WITNESSES. I understand I have the right to be confronted by the witnesses against me and to use the process of the court to subpoena witnesses on my behalf and to cross-examine witnesses that testify against me. I have the right to testify on my own behalf.

I UNDERSTAND AND GIVE UP THIS RIGHT MH

5. MY RIGHT AGAINST SELF-INCRIMINATION. I understand that pursuant to the Constitutions of the United States and of the State of California, I do not have to be a witness against myself. I further understand that if a plea of guilty or nolo contendere is entered on my behalf, that such a plea is an admission against me and incriminates me.

I UNDERSTAND AND GIVE UP THIS RIGHT MH

6. MY RIGHT TO BE PRESENT IN THE COURTROOM AT THE TIME OF TRIAL AND OF SENTENCING. I understand that I have the right to be present in the courtroom at the time of the trial of this matter and at the time of sentencing if I or my attorney enters a plea of guilty or nolo contendere, or I am found guilty.

I UNDERSTAND AND GIVE UP THIS RIGHT MH

7. MY RIGHT TO BE SENTENCED WITHIN A REASONABLE TIME. I understand that I cannot be sentenced any earlier than six (6) hours or any longer than five (5) days after a plea has been entered or I am found guilty unless I specifically waive the statutory time for sentencing.

I UNDERSTAND AND GIVE UP THIS RIGHT MH

8. I HAVE BEEN ADVISED OF PENAL CODE Section 1016.5: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

I UNDERSTAND THIS ADVISAL MH

The Court or my attorney has fully described the nature of the charges against me. The Court or my attorney also has informed me of all the possible consequences of entering a plea of either guilty or nolo contendere including but not limited to the possible maximum jail sentence that could be imposed on this charge.

I understand that a plea of nolo contendere has the same effect as a plea of guilty but cannot be used against me in any possible civil action arising out of this incident.

Having been advised of the rights set forth above, and with full knowledge and understanding of those rights and of the effect of waiving them, I hereby specifically waive each and every one of said rights and enter a plea of guilty or nolo contendere, myself or by my attorney.

I hereby declare that no one has told me or promised me or suggested to me that I would receive a lighter sentence or probation or any favors nor has anyone threatened or promised to reward me, my family or anyone else in order to induce me to sign this waiver.

I understand that I have the right to have my case heard by a Judge of the Municipal Court. I waive this right and agree that this case may be heard and sentence imposed by the Municipal Court Commissioner as a temporary Judge.

DATED: 2/18/97

Michael Hanks
Defendant

ATTORNEY'S STATEMENT

I understand the attorney of record for the defendant. I have gone over the form with my client. I have explained each of the defendant's rights to the defendant and answered all the defendant's questions in regard to this plea. I have discussed the facts of the defendant's case with the defendant, and explained the consequences of this plea, the elements of the offenses, and the possible defenses. I agree to explain fully to the defendant the provisions of Penal Code Section 1203.3 and Section 1203.4.

DATED: 2-18-97

Attorney for Defendant

BMC 640 2125 071a (Rev 2/95)(Front)

IN THE BMC COURT
COUNTY OF KERN, STATE OF CALIFORNIA

DEFENDANT'S NAME Michael Hanks CASE NO. 539044A DATE 2/10/07

ORDER GRANTING PROBATION AND TERMS OF PROBATION

JUDGE: MBL CHARGES: PC 12031(a)

TCORG ☑ ORIGINAL TERMS AND CONDITIONS OF PROBATION

TCAMD ☐ AMENDED TERMS AND CONDITIONS OF PROBATION

TCPG ☑ PROBATION GRANTED AS TO COUNT ____.

TCPC ☑ IMPOSITION OF SENTENCE SUSPENDED AND DEFENDANT PLACED ON PROBATION FOR A PERIOD OF 3 YRS 0 MOS ____ DAYS. TYPE OF PROBATION:
☐ A. FORMAL ☐ B. COURT

TCDA ☐ SENTENCE OF ____ DAYS IN JAIL SUSPENDED FOR: ____ YEARS; ____ MONTHS; ____ DAYS.
☐ A. DEFENDANT PLACED ON FORMAL PROBATION.
☐ B. DEFENDANT PLACED ON COURT PROBATION.

TCRFV ☑ REFRAIN FROM FURTHER VIOLATION OF THE LAW.

MOTOR VEHICLES/ALCOHOL

TCAAM ☐ ATTEND ALCOHOLICS ANONYMOUS MEETINGS FOR THE PERIOD OF ____.

TCLN ☐ DURING PROBATIONARY PERIOD, NOT TO OPERATE A MOTOR VEHICLE UNLESS DULY LICENSED BY THE STATE OF CALIFORNIA AND INSURED.

TCNA ☐ NOT TO INDULGE IN THE USE OF INTOXICANTS OR VISIT ANY PLACES WHERE INTOXICANTS ARE SOLD AS A PRIMARY INCOME OR BUSINESS
☐ A. DURING YOUR PROBATIONARY PERIOD.
☐ B. UNTIL YOU REACH THE AGE OF 21 YEARS.

TCBA ☐ DEFENDANT TO SUBMIT TO A BLOOD, BREATH OR URINE TEST AT THE REQUEST OF ANY PEACE OFFICER OR PROBATION OFFICER TO DETERMINE
☐ A. BLOOD ALCOHOL CONTENT.
☐ B. DRUG DETECTION
☐ C. BLOOD ALCOHOL CONTENT AND DRUG DETECTION.

TCND ☐ NOT TO DRINK AND DRIVE DURING PROBATION PERIOD, WITH ANY MEASURABLE AMOUNT OF ALCOHOL OR DRUGS IN YOUR BLOOD.

TCNAL ☐ DO NOT USE ALCOHOL TO EXCESS.

TCDMV ☐ DMV SHALL REVOKE/SUSPEND DRIVING PRIVILEGE FOR ____ YEARS; ____ MOS. ____ DAYS PURSUANT TO CVC ____.

TCSBP ☐ DEFENDANT IS ADVISED THAT COMPLETIONS OF THE 99 30 PROGRAM IS REQUIRED TO BECOME ELIGIBLE FOR A CALIFORNIA DRIVERS LICENSE UPON EXPIRATION OF THE REVOCATION PERIOD PURSUANT TO CVC 13392(A)(5) AND 11352(A)(7).

TCLIS ☐ LICENSE SUSPENDED FOR ____ YEARS; ____ MOS; ____ DAYS.

TCSL ☐ DEFENDANT TO SURRENDER DRIVER'S LICENSE TO COURT AS DIRECTED ON "DRIVER'S LICENSE RESTRICTION/SUSPENSION FORM" GIVEN TO DEFENDANT. LICENSE TO BE RETURNED TO DEFENDANT ON COMPLETION OF THE SUSPENSION PERIOD.
LICENSE TO BE SURRENDERED TO THE COURT
☐ A. FORTHWITH
☐ B. BY ____.

TCCA ☐ DEFENDANT TO PARTICIPATE IN A COUNTY-APPROVED
☐ A. ALCOHOL EDUCATION PROGRAM.
☐ B. 99 30 PROGRAM.
☐ C. ____.

TCAPE ☐ DEFENDANT TO ATTEND FIRST OFFENDER DUI PROGRAM SCHOOL, ENROLL WITHIN ONE WEEK, AND SUBMIT PROOF OF COMPLETION BY ____.

TCID ☐ THE DEFENDANT IS ORDERED TO INSTALL AN IGNITION INTERLOCK DEVICE ON ALL VEHICLES OWNED OR OPERATED BY DEFENDANT FOR A PERIOD OF ____ YEARS, PURSUANT TO CVC 23246(A). DEFENDANT IS TO COMPLY WITH ALL ITEMS LISTED ON THE "ORDER TO INSTALL IGNITION INTERLOCK DEVICE" FORM (INCORPORATED HEREIN BY REFERENCE) AS A TERM OF HIS PROBATION.

TCIL ☐ THE COURT DETERMINES THAT DEFENDANT CANNOT PAY FOR THE IGNITION INTERLOCK DEVICE.
☐ A. DEFENDANT TO SERVE ____ HOURS COMMUNITY SERVICE IN LIEU OF INSTALLATION OF IGNITION INTERLOCK DEVICE PURSUANT TO CVC 23249(B).
☐ B. INSTALLATION OF IGNITION INTERLOCK DEVICE IS WAIVED PURSUANT TO CVC 23249(B).

TCIDW ☐ INSTALLATION OF IGNITION INTERLOCK DEVICE IS WAIVED IN THE INTEREST OF JUSTICE.

JAIL TIME

TCDJ ☐ DEFENDANT TO SERVE 45 DAYS IN CUSTODY AS TO COUNT 1.

TCDJ ☐ DEFENDANT TO SERVE ____ DAYS IN CUSTODY AS TO COUNT ____.

SENA ☐ COUNT ____ TO BE SERVED
☐ A. CONCURRENT WITH COUNT ____.
☐ B. CONSECUTIVE WITH COUNT ____.
☐ C. CONCURRENT WITH CASE NUMBER ____.
☐ D. CONSECUTIVE TO CASE NUMBER ____.
☐ E. CONCURRENT WITH TIME NOW BEING SERVED.
☐ F. CONSECUTIVE TO TIME NOW BEING SERVED.

TCSEJ ☐ SSW OF EXECUTION OF SENTENCE TO JAIL GRANTED UNTIL ____ AT ____.

TCWNR ☐ DEFENDANT REFERRED TO WORK RELEASE PROGRAM.

TCWNR ☐ NO WORK RELEASE ALLOWED.

TCCTS ☑ CREDIT FOR TIME SERVED OF 30 DAYS PLUS 15 DAYS GOOD AND WORK TIME, FOR A TOTAL OF 45 DAYS.

TCCLJ ☐ DEFENDANT TO BE GIVEN CREDIT FOR TIME SERVED JAIL TO CALCULATE THE AMOUNT.

TCSJJ ☐ ____ DAYS SUSPENDED ON CONDITION DEFENDANT SERVE ____ DAYS AS TO COUNT ____.

TCNJ ☐ DEFENDANT TO SERVE ____ WEEKEND(S) AS TO COUNT ____ COMMENCING ON ____ AT 6:00 P.M. AND RELEASED ON ____ AT 8:00 A.M. ARRIVING CUSTODIAN NOT RESPONSIBLE IF NOT RECEIVED AT
☐ A. LERDO.
☐ B. MAIN JAIL.
☐ C. RIDGECREST POLICE DEPARTMENT.
☐ D. ____.

TCAAR ☐ DEFENDANT TO ATTEND THE ALCOHOL REHABILITATION OFFICE LERDO PROGRAM WHILE IN CUSTODY.

TCSAP ☐ DEFENDANT REFERRED TO SUBSTANCE ABUSE PROGRAM AT LERDO.

FINES

TCFN ☐ DEFENDANT ORDERED TO PAY THE FINE OF $ ____ PLUS $ ____ P/A PLUS $ ____ HMVF FEE, PLUS $ ____ C.L. FEE, LESS $ ____ FOR TIME SERVED AT THE RATE OF $ ____ PER DAY AS TO COUNT ____.

TCFPL ☐ AS TO COUNT ____ DEFENDANT TO PAY FINE OF $ ____ PLUS P/A OF $ ____ PLUS ____. TOTAL $ ____.

TCFJ ☐ OR, IN LIEU OF SAID FINE AS TO COUNT ____, TO SERVE ____ DAY IN JAIL AT THE RATE OF $ ____ PER DAY, COMMENCING ON ____.

SWRTN ☐ OR RETURN TO COURT ON ____ AT ____ IN ____ COURT, D- ____.

TCFFW ☐ TOTAL FINE(S) AND ASSESSMENT(S) OF $ ____ TO BE PAID FORTHWITH.

TCFCB ☐ TOTAL FINE(S) AND ASSESSMENT(S) OF $ ____ TO BE TAKEN FROM CASH BAIL POSTED, AND BALANCE, IF ANY, TO BE RETURNED TO DEPOSITOR.

TCFEE ☐ DEFENDANT TO PAY ____ FOR ____.

TCSHS ☐ AS TO COUNT ____ DEFENDANT TO PAY FINE OF $ ____ PURSUANT TO H&S 11372.7.

TCHS ☐ DEFENDANT ASSESSED ADDITIONAL ACCOUNTS RECEIVABLE FEE OF $ ____. TOTAL FINE(S) AND ASSESSMENT(S) OF $ ____ TO BE PAID IN INSTALLMENTS OF $ ____ ON ____ AND $ ____ ON THE ____ OF EACH MONTH UNTIL PAID. IN THE EVENT OF DEFAULT, BALANCE WILL ACCELERATE AND BECOME DUE AND PAYABLE FORTHWITH.

TCHW ☐ DEFENDANT ASSESSED ADDITIONAL ACCOUNTS RECEIVABLE FEE OF $ ____. DEFENDANT TO PAY FINE(S) AND ASSESSMENTS OF $ ____ FORTHWITH OR DEFENDANT ORDERED TO REPORT TO REVENUE RECOVERY DIVISION AND COMPLETE AN APPLICATION FOR FINANCIAL EVALUATION AND EXECUTE AN AGREEMENT TO SATISFY COURT ORDER AND/OR TERMS OF PROBATION. FIRST INSTALLMENT PAYMENT SHALL BE DUE TO DAY.

TCHS ☐ DEFENDANT ASSESSED ADDITIONAL ACCOUNTS RECEIVABLE FEE OF $ ____. DEFENDANT TO PAY FINE(S) AND ASSESSMENTS OF $ ____ WITHIN TWO (2) COURT DAYS OR IF IN CUSTODY, WITHIN TWO (2) DAYS FROM RELEASE OR DEFENDANT ORDERED TO REPORT TO REVENUE RECOVERY DIVISION AND COMPLETE AN APPLICATION FOR FINANCIAL EVALUATION AND EXECUTE AN AGREEMENT TO SATISFY COURT ORDER AND/OR TERMS OF PROBATION WITHIN TWO (2) COURT DAYS, OR, IF IN CUSTODY, WITHIN TWO (2) COURT DAYS FROM RELEASE. FIRST INSTALLMENT PAYMENT SHALL BE DUE TO DAY.

TCSEF ☐ SSW OF EXECUTION OF SENTENCE TO PAY TOTAL FINE(S) AND ASSESSMENT(S) OF $ ____ AS TO COUNT(S) ____ GRANTED UNTIL ____.

TCPTC ☐ ALL PAYMENTS ON FINES TO BE MADE DIRECT TO THE ABOVE-ENTITLED COURT.

TCCON ☐ TOTAL FINES AND ASSESSMENT(S) CONSOLIDATED WITH CASE NUMBER ____ IN TRUST ACCOUNT.

TCDNP ☐ DEFENDANT TO PAY CHARITY DONATION OF $ ____ TO ____ BY ____.

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TERMS OF PROBATION - PAGE 2

SEARCH/REGISTRATION/TEST

TCS ☐ VOLUNTARILY SUBMIT TO A SEARCH OF YOUR PERSON, VEHICLE OR RESIDENCE AT THE REQUEST OF ANY PEACE OFFICER OR PROBATION OFFICER DAY OR NIGHT WITHOUT THE NECESSITY OF A SEARCH WARRANT
☐ 1. UPON PROBABLE CAUSE.
☐ 2. WITHOUT PROBABLE CAUSE.
☐ 3. UPON REASONABLE CAUSE.
☐ A. FOR NARCOTICS AND PARAPHERNALIA AS TO COUNT ____.
☐ B. FOR STOLEN PROPERTY AS TO COUNT ____.
☐ C. FOR NARCOTICS, PARAPHERNALIA AND STOLEN PROPERTY AS TO COUNT ____.
☐ D. ____.

TCPN ☐ DEFENDANT TO REFRAIN FROM THE USE AND POSSESSION OF, NOR HAVE UNDER HIS/HER CONTROL, ANY NARCOTIC, RESTRICTED DANGEROUS DRUG, MARIJUANA OR HALLUCINOGENIC DRUG, AND DO NOT ASSOCIATE OR BE WITH ANY SUCH PERSON, NOR BE IN, AROUND OR ABOUT ANY PLACE WHERE ANY SUCH SUBSTANCE IS SOLD, SUPPLIED, STORED OR IS [illegible].

TCNON ☐ DEFENDANT NOT TO USE OR IN ANY WAY TRAFFIC IN NARCOTICS AND NOT TO ASSOCIATE WITH ANY PERSONS USING OR IN ANY WAY TRAFFICKING IN NARCOTICS AS TO COUNT(S) ____.

TCCLP ☐ DEFENDANT TO PAY $ ____ CRIMINALIST LAB FEE BY ____ AS TO COUNT(S) ____.

TCRS ☐ REGISTER AS REQUIRED PURSUANT TO
☐ A. H&S 11590 AS NARCOTICS OFFENDER AS TO COUNT(S) ____.
☐ B. PC 290 AS A SEX OFFENDER AS TO COUNT(S) ____.
☐ C. PC 457.1(b) AS AN ARSON OFFENDER AS TO COUNT(S) ____.

VOLUNTEER/COMMUNITY SERVICE

TCCS ☐ DEFENDANT ORDERED TO COMPLETE ____ HOURS OF COMMUNITY SERVICE BY ____ AS DIRECTED BY
☐ A. THE PROBATION OFFICER.
☐ B. THE COMMUNITY SERVICE REPRESENTATIVE.
☐ C. ____.

TCSCS ☐ ____ DAYS IN CUSTODY STAYED PENDING COMPLETION OF COMMUNITY SERVICE.

TCFS ☐ DEFENDANT TO SERVE ____ HOURS COMMUNITY SERVICE IN LIEU OF BALANCE OF FINE.

COUNSELING/REHABILITATION

TCNE ☐ DEFENDANT TO ENROLL IMMEDIATELY IN AND PURSUE CARE, AND TO OBEY ALL REASONABLE INSTRUCTION, CONTINUING UNTIL TERMINATED WITH
☐ A. PSYCHIATRIC CARE.
☐ B. COUNTY APPROVED TREATMENT PROGRAM.
☐ C. KERN DEPT. OF MENTAL HEALTH.
☐ D. KERN REGIONAL CENTER.
☐ E. COUNSELING.
☐ F. ____.

RESTITUTION

TCCR ☐ DEFENDANT TO MAKE RESTITUTION FOR DAMAGES AS TO COUNT(S) ____.
☐ A. IN AMOUNT AND MANNER TO BE DETERMINED BY THE PROBATION OFFICE AND ORDERED BY THE COURT. DEFENDANT ADVISED IN RE: CERVANTEZ.
☐ B. IN THE AMOUNT OF $ ____ AND IN A MANNER TO BE DETERMINED BY THE PROBATION OFFICE AND ORDERED BY THE COURT. DEFENDANT ADVISED IN RE: CERVANTEZ.
☐ C. IN THE AMOUNT OF $ ____ AT THE RATE OF $ ____ PER MONTH THROUGH THE PROBATION DEPARTMENT.
☐ D. IN THE AMOUNT AND MANNER TO BE DETERMINED BY THE DEPARTMENT OF HUMAN SERVICES AND ORDERED BY THE COURT.
☐ E. IN THE AMOUNT OF $ ____ AND IN A MANNER TO BE DETERMINED BY THE DEPARTMENT OF HUMAN SERVICES AND ORDERED BY THE COURT.
☐ F. IN THE AMOUNT OF $ ____ AT THE RATE OF $ ____ PER MONTH TO ____.
☐ G. IN THE AMOUNT OF $ ____ AT THE RATE OF $ ____ PER MONTH TO ____ BEGINNING ____.

TCPP ☐ DEFENDANT ORDERED TO REPORT TO PROBATION OFFICER
☐ A. WITHIN 5 DAYS OF RELEASE FROM CUSTODY.
☐ B. FORTHWITH
☐ C. ____.
☐ D. ANY CHANGE IN HIS/HER ADDRESS UNTIL RESTITUTION IS PAID.

MISCELLANEOUS

TCFP ☐ REPORT TO IDENTIFICATION BUREAU TO BE FINGERPRINTED AND PHOTOGRAPHED PURSUANT TO P.C. 1203.3 AT
☐ A. KERN COUNTY SHERIFF OFFICE.
☐ B. ____.

TCNCC ☐ DEFENDANT ORDERED NOT TO CONTACT, CALL OR OTHERWISE COMMUNICATE WITH ____ DURING PROBATIONARY PERIOD.

TCNCO ☐ DEFENDANT NOT TO INITIATE CONTACT, CALL OR OTHERWISE COMMUNICATE WITH ____ DURING PROBATIONARY PERIOD.

TCSAS ☐ STAY AWAY FROM ____.

TCNFV ☐ USE NO FORCE OR VIOLENCE UPON ____.

TCNAM ☐ DEFENDANT IS ORDERED NOT TO ASSOCIATE WITH MINORS UNDER THE AGE OF 18, NOR FREQUENT PLACES WHERE MINORS CONGREGATE UNLESS IN THE PRESENCE OF A RESPONSIBLE ADULT APPROVED BY THE PROBATION DEPARTMENT.

TCNCA ☐ DEFENDANT NOT MAINTAIN A CHECKING ACCOUNT OR HAVE ANY CHECKS IN HIS/HER POSSESSION EXCEPT PAYROLL OR BUSINESS CHECKS PAYABLE TO HIM/HER.

TCNFA ☑ DEFENDANT NOT TO HAVE FIREARMS OF ANY DESCRIPTION IN HIS/HER POSSESSION DURING HIS/HER PERIOD OF PROBATION.

TCNPS ☑ DO NOT HAVE IN POSSESSION ANY WEAPON THAT VIOLATES THE DANGEROUS WEAPON CONTROL CONTROL LAW

TCNP ☑ UPON EXPIRATION OF APPEAL PERIOD, WEAPON ORDERED
☐ A. CONFISCATED AND DESTROYED.
☐ B. RETURNED TO RIGHTFUL OWNER UPON PROOF OF LEGAL OWNERSHIP.
☐ C. ____.

TCWR ☐ WEAPON ORDERED CONFISCATED AND, IN LIEU OF DESTRUCTION, IS TO BE RELEASED FOR TRAINING PURPOSES PURSUANT TO PC 12028 AND PC 12030 TO
☐ A. KERN COUNTY SHERIFF'S OFFICE.
☐ B. ____.

TCRE ☐ ALL PREVIOUSLY ORDERED TERMS AND CONDITIONS OF PROBATION TO REMAIN IN EFFECT.

SHOTH ☐ HEARING SET ON ____ AT ____ IN ____ COURT, D- ____ FOR ____.

TCOTH ☐ ____

MADE ☐ ALL SENTENCE ELEMENTS FOR THIS PROCEEDING ENTERED.

I HAVE READ AND UNDERSTAND THE TERMS OF PROBATION AND ORDER SET FORTH ABOVE AND UNDERSTAND THE CONSEQUENCES OF A VIOLATION OF PROBATION. I HEREBY ACKNOWLEDGE RECEIPT OF A COPY THEREOF. THIS 10 DAY OF Feb 07

Michael 315 1/2 Madison — DEFENDING ADDRESS
Bakersfield, Ca 93307 — CITY, STATE, ZIP

DOB 3/25/77 DEFENDANT

NOTE TO DEFENDANT: UPON SATISFACTORY COMPLETION OF THE TERMS OF PROBATION, YOU MAY APPLY THROUGH THE PROBATION DEPARTMENT TO HAVE YOUR CONVICTION SET ASIDE, PURSUANT TO SECTION 1203.4 OF THE PENAL CODE.

INTERPRETER'S STATEMENT

I, ____, duly translated this form and all the statements therein to the defendant in the ____ language.

I declare, under penalty of perjury, that the foregoing is true and correct.

DATED: ____, 19 ____